UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND HENDERSON, Petitioner - Appellant, v. ANTHONY LA MARQUE, Warden, Respondent - Appellee.	No. 02-17058 D.C. No. CV-00-03910-CRB Northern District of California, San Francisco ORDER

Before: HALL, O'SCANNLAIN, and LEAVY, Circuit Judges.

The disposition filed on October 30, 2003, is hereby amended as follows:

On page 2, replace the second full paragraph with the following two paragraphs:

"With regard to Henderson's claim that a fourth juror, Louise Toboroff, was struck because of her gender, we do not agree with the district court that this claim was waived because no person-specific Batson objection was made at trial. Under California law, a Batson objection to a pattern of discriminatory challenges is timely if made before jury impanelment is completed; the general objection relates back to jurors dismissed earlier in the jury selection process. See People v. McDermott, 28 Cal. 4th 946, 969

(2002); see also United States v. Thompson, 827 F.2d 1254, 1257 (9th Cir. 1987) (permitting objection raised after jury was sworn because it "might not have been apparent until the jury was selected, so the objection could not, in any case, have been raised much earlier").

Even though Henderson's objection to Toboroff was timely, however, the California Supreme Court has not further required prosecutors to provide individual neutral justifications for jurors included in the general objection. See McDermott, 28 Cal. 4th at 980 ("Although we agree that it is generally preferable to have individual reasons and individual findings for each challenged juror, we have never required them."). Moreover, because Henderson's claim is a novel one under federal law, it was not "objectively unreasonable" for the California Court of Appeal to conclude that the prosecutor was not required to offer a gender-neutral justification for Toboroff's exclusion in the absence of a person-specific objection. See 28 U.S.C. § 2254(d)(1); Andrade, 123 S.Ct. at 1174-75. And the trial court's ultimate determination under the third step of the Batson inquiry that Henderson had not established purposeful discrimination by the prosecution is a factual finding presumed correct unless rebutted by clear and convincing evidence under AEDPA. See 28 U.S.C. § 2254(e)(1); Purkett v.

Elem, 514 U.S. 765, 769 (1995) (purposeful discrimination inquiry under Batson results in a factual finding by state trial court). Henderson has not proffered such evidence of purposeful discrimination."

With this amendment, the panel has voted to deny the petition for rehearing and suggestion for rehearing en banc. All the judges voted to deny the petition for panel rehearing. Judge O'Scannlain voted to deny the suggestion for rehearing en banc, and Judges Hall and Leavy so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35.

The petition for rehearing and suggestion for rehearing en banc are therefore DENIED.